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Nos. 94-923, [redacted]

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1994

RUTH O. SHAW, *et al.*,
Appellants,
and
JAMES ARTHUR "ART" POPE, *et al.*,
Appellant-Intervenors,

v.

JAMES B. HUNT, JR., in his official capacity
as Governor of the State of North Carolina, *et al.*,
Appellees,
and
RALPH GINGLES, *et al.*,
Appellee-Intervenors.

On Appeal from the United States District Court
for the Eastern District of North Carolina
Raleigh Division

APPELLANTS' BRIEF IN OPPOSITION TO APPELLEES' MOTIONS TO DISMISS OR AFFIRM

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INTRODUCTION

After the plaintiff-appellants (Shaw *et al.*) and the plaintiff-intervenor appellants (Pope *et al.*) had filed and personally served their jurisdictional statements on November 21, 1994, the State-appellees (Hunt *et al.*) filed a motion to affirm on December 22, 1994; and on December 30, 1994, the defendant-intervenor appellees

(Gingles *et al*) filed a motion to dismiss or affirm.[1] The appellees contested the standing of appellants (S.A.M. 21-22; G.A.M. 22-27); and they disputed the district court's determination that North Carolina's congressional districts were racially gerrymandered. (S.A.M. 22-23; G.A.M. 29). Also, appellees claimed that the District Court properly applied the test of "strict scrutiny" to the North Carolina plan. (S.A.M. 22; G.A.M. 4-22). Pursuant to Rule 18.8 of the Rules of the Supreme Court, this brief in opposition addresses appellants' standing; the racial gerrymandering of the congressional districts; and the district court's failure to apply "strict scrutiny".

I. APPELLANTS' STANDING WAS CLEARLY ESTABLISHED.

In ruling that the appellants had established their standing, the district court properly concluded that this Court's decision in *Shaw v. Reno*, ___U.S.___, 113 S.Ct. 1816 (1993) "necessarily ... implied a standing principle that accords standing to challenge a race-based redistricting plan to any voter who can show that it has assigned him to vote in a particular electoral district in part at least because of his race". (App. J.S. 26a; *Shaw v. Hunt*, 861 F.Supp 408, 427 (E.D.N.C. 1994)). If appellees wished to challenge the lower court's ruling as to appellants' standing, they should have cross-appealed.

In any event, the district court's interpretation of *Shaw v. Reno* is clearly correct. Because "racial classifications with respect to voting carry particular dangers" and "may balkanize us into competing racial factions", (113 S.Ct. at 2832), it follows logically that *any* registered voter is entitled to sue to prevent this result.

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1 The motion of the State appellees is referred to hereinafter as "S.A.M." and that of the defendant-intervenors as "G.A.M."

Indeed, so long as the Fourteenth Amendment entitles "any person within" North Carolina's jurisdiction to equal protection of its laws, how can standing be denied registered voters to attack a redistricting plan which "bears an uncomfortable resemblance to political apartheid" (113 S.Ct. at 2827); which "reinforces the perception that members of the same racial group -- regardless of their age, education, economic status, or the community in which they live -- think alike, share the same political interests and will prefer the same candidates at the polls" (*id.*.); and which "reinforces racial stereotypes and threatens to undermine our system of representative democracy by signaling to elected officials that they represent a particular racial group rather than their constituency as a whole"? (113 S.Ct. at 2828) By its emphasis on the widespread injury that results from an unmistakable racial gerrymander, the Court "inferentially decided [appellants] had constitutional standing to sue". [2]

Appellants' standing is also derived from the statutory requirement that "[in each State] there shall be established by law a number of districts equal to the number of Representatives to which such State is ... entitled". 2 U.S.C. § 2c. Presumably Congress imposed this requirement because it was convinced that the election of Representatives at large or from multimember districts would adversely affect the quality of the representation provided to constituents. However, as was explained in *Vera*, single-member congressional districts also do not promote effective representative government

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2 See *Vera v. Richards* (hereinafter *Vera*), 861 F.Supp. 1304, 1331, n.38 (S.D.Tex. 1994). There the three-judge court expressed its agreement with the "reasoning and conclusions" expressed in *Shaw v. Hunt* as to registered voters' standing to challenge racial gerrymanders. *Ibid.*

when traditional redistricting principles are ignored in drawing those districts.[3]

Even a glance at the North Carolina statute delineating the congressional district boundaries (App. J.S. 169a-240a) or at the map showing those boundaries (113 S.Ct. at 2833) makes clear that the redistricting plan disregarded every "traditional districting principle". By so doing, the plan harmed representative government for the reasons pointed out in *Vera, supra,* n.3. This harm was inflicted because the General Assembly violated the congressional intent implicit in 2 U.S.C. § 2c. As

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3 See *Vera, supra* at 1334-35, n.43:

Traditional objective districting criteria are a concomitant part of truly "representative" single-member districting plans. Organized political activity takes place most effectively within neighborhoods and communities; on a larger scale, these organizing units may evolve into media markets and geographic regions. When natural geographic and political boundaries are arbitrarily cut, the influence of local organizations is seriously diminished. After the civic and veterans groups, labor unions, chambers of commerce, religious congregations and school boards are subdivided among districts, they can no longer importune *their* Congressman and expect to wield the same degree of influence that they would if all their members were voters in his district. Similarly, local groups are disadvantaged from effectively organizing in an election campaign because their numbers, money, and neighborhoods are split. Another casualty of abandoning traditional district principles is likely to be voter participation in the electoral process. A citizen will be discouraged from undertaking grassroots activity if, for instance, she has attempted to distribute leaflets in her congressman's district only to find that she could not locate its boundaries. ...

As the influence of truly local organizations wanes, that of special interests waxes. Incumbents are no longer as likely to be held accountable by vigilant, organized local interests after those interests have been dispersed. The bedrock principle of self-government, the interdependency of representatives and their constituents, is thus undermined by ignoring traditional districting principles.

participants in representative government, registered voters like the appellants suffered direct injury and, therefore, they have standing to sue for relief.

II. THE REDISTRICTING PLAN WAS AN UNMISTAKABLE RACIAL GERRYMANDER

Appellees seek now to question the district court's decision that the redistricting plan is subject to "strict scrutiny" because it is a racial gerrymander. The Court should reject this new attempt to evade the State defendant-appellees' earlier concession that the plan was racially gerrymandered. (See App. J.S. 26a-38a, 110a; 861 F.Supp. at 427-434, 473-474). Furthermore, not having cross-appealed from the judgment below, the appellees have waived the right to dispute that the congressional districts were racially gerrymandered.

Appellees purport to rely on the language of the Court's holding in *Shaw v. Reno* that "appellants have stated a claim under the Equal Protection Clause by alleging that the North Carolina General Assembly adopted a reapportionment scheme so irrational on its face that it can be understood only as an effort to segregate voters into separate voting districts because of their race". (113 S.Ct. 2832). This argument misreads the Court's intent in using the word "only" -- which obviously was meant to exclude a hypothetical situation where "a legislature could show that it would have enacted precisely the same plan even if it had not considered race at all". (See App. J.S. 34a. n.18, 861 F.Supp. at 432, n.18). The Court, however, never intended to limit "strict scrutiny" to those situations where the race-based plan was the result "only" of racial considerations. Otherwise, as was pointed out in *Hays v. Louisiana,* 839 F.Supp. 1188, 1202 (W.D.La. 1993), a state could avoid "strict scrutiny" of an admitted and overt racial gerrymander so long as it could

show that the legislature had also taken into account some other factor -- such as incumbency protection -- in drawing boundaries. Such an outcome would conflict with the Court's established precedent. *Arlington Heights v. Metropolitan Housing Dev. Corp.*, 429 U.S. 252, 265-66 (1977); *Hunter v. Underwood*, 471 U.S. 222, 231 (1985).

III. THE DISTRICT COURT UNQUESTIONABLY MISAPPLIED THE "STRICT SCRUTINY" TEST.

From its purported "strict scrutiny" of the redistricting plan, the district court concluded that the state had adequately demonstrated a "compelling interest" and "narrow tailoring". The appellees now contend that the questions appellants present concerning this conclusion are too insubstantial to warrant briefing and oral argument. The implausibility of this contention is made apparent by Chief Judge Voorhees' extensive dissent in the district court (App. J.S. 116a-154a; 861 F.Supp. 476-497), and by Circuit Judge Edith Jones' opinion in *Vera*, 861 F.Supp. at 1333, n.40 and at 1343-44, n.55. Indeed, as Judge Jones correctly points out, "By all accounts, North Carolina's majority-minority districts, like those of Texas, are among the most distorted in the nation. If those districts survive constitutional close scrutiny, then *Shaw* may be a meaningless exercise". (861 F.Supp. at 1333, n.40.)

In upholding the racial gerrymander, the district court found as a "compelling interest" that the General Assembly had created two majority-black districts "in order to comply with §§ 2 and 5 of the Voting Rights Act, on the basis of the well-founded belief of a sufficient majority of its membership that failure to do so would, or might well, violate one or both of these provisions". (App. J.S. 108a; 861 F.Supp. at 473). Absent this "perceived compulsion", such legislative action would not

have taken place. (*Ibid.*)

In *Shaw v. Reno*, the Court observed that states "have a very strong interest in complying with federal antidiscrimination laws that are constitutionally valid as interpreted and as applied" (113 S.Ct. 2830).[4] However, North Carolina's plan was the result of the General Assembly's surrender to the heavy-handed "maximization" policy of the Civil Rights Division [5] -- a policy which exceeded statutory authority [6] and was unconstitutional.[7]

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4 In its context the Court's language seems chosen to suggest that this interest -- although "very strong" -- is not of itself "compelling". Since this interest was the only one accepted by the district court, the redistricting plan should have failed the "strict scrutiny" test.

5 The General Assembly first enacted a redistricting plan which contained a single majority-black district. In seeking preclearance of this plan under Section 5, it submitted an extensive Memorandum to the Department of Justice on October 14, 1991 (See App. J.S. 123a n.9; 861 F.Supp. at 480-81 n.9). This Memorandum -- which was submitted in the names, *inter alia*, of House Speaker Daniel T. Blue and House Redistricting Committee Co-Chair Toby Fitch (both African-Americans) -- apparently reflected the belief of the Legislature's leadership at that time that a single majority-black district met the requirements of the Voting Rights Act. Pursuant to its policy of "if-you can, you must", the Civil Rights Division denied preclearance because it concluded that, if traditional districting principles were ignored, two majority-black districts could be created. The implementation of this same policy is reflected not only in the record here but also in *Hays v. Louisiana*, 839 F.Supp. 1188, 1196-97 (W.D.La. 1993); and *Johnson v. Miller*, 864 F.Supp. 1354, 1360-69 (S.D.Ga. 1994).

6 *Hays v. Louisiana, supra* at 1196-97, n.21 (W.D..La. 1993).

7 "To erect the goal of proportional representation is to erect an implicit quota for black voters" and is unconstitutional. *Johnson v. Miller, supra*, at 1379 (S.D.Ga.1994).

Such acquiescence fulfilled no State interest -- "compelling", "very strong", or otherwise.

The appellees also insist that the General Assembly believed that the State's African-American minority could present a convincing Section 2 challenge to any redistricting plan which did not contain two majority-minority districts. (S.A.M. 13) The Memorandum which the General Assembly submitted to the Department of Justice on October 14, 1991, makes clear that the General Assembly had a belief diametrically opposed to the belief attributed to it by appellees and by the majority in the district court.

As the Memorandum makes clear, this belief was supported by the well-founded conviction that no one who attacked North Carolina's first redistricting plan for the failure to create two minority-black districts could prove the three threshold conditions: geographical compactness of the minority group; its political cohesiveness; and bloc voting by the white majority. *Thornburg v. Gingles*, 478 U.S. 30, 50-51 (1986); *Shaw v. Reno*, *supra* at 2831. The first condition is especially difficult to meet because, as a matter of mathematics and geometry, the "relative dispersion" of the black population makes it impossible to create two geographically compact districts in which a majority of the voting age population is black.[8] Nothing

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8 Blacks constitute a majority of the general population in only five of the State's 100 counties; (113 S.Ct. at 2820); and four of those counties have only a small population. Because of the substantial population of Native-Americans in Robeson County (North Carolina's largest county in area), it would be easier to create two districts in which whites were a minority than two districts in which blacks were a majority. Moreover, it is indisputable that two majority-black districts could be created that are more "geographically compact" than North Carolina's First and Twelfth Districts. To appellants -- but not to appellees or to the majority in the district court -- this

in the legislative record indicates that the General Assembly changed its belief -- as expressed in the Memorandum of October 14, 1991, to the Department of Justice -- that a redistricting plan with only one majority-black district would comply with Section 2 of the Voting Rights Act. In short, the legislative history makes clear that enactment of the second redistricting plan resulted from the General Assembly's conclusion that to contest the denial of preclearance would be too costly and time-consuming and from a perception by the Democratic leadership that it could create two "bizarre" majority-black districts without imperiling Democratic incumbents. No "compelling interest" can be extracted from this history!

If, however, there had been any "compelling interest" to justify enactment of a plan with two majority-black districts, the plan enacted was not "narrowly tailored", for it went far "beyond what [is] reasonably necessary" to further any such interest. *See, Hays v. Louisiana*, *supra* at 1206-07.[9] As the defendants did not dispute at trial, two majority-black districts could have been created which were more "geographically compact" than the First and the Twelfth Districts in the redistricting plan. Such districts would have imposed a lighter burden on the "rights and interests" of North Carolina citizens

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circumstance demonstrates the absence of "narrow tailoring". *Cf. Vera*, *supra* at 1343-44, n.55.

9 As *Hays* observes, "just as a homicide defendant may not use excessive force to stop an agressor, neither may a state burden the rights and interests of its citizens more than is reasonably necessary to further the compelling governmental interest advanced by the State". *Ibid.*

and would have less flagrantly created a "perception" of racial segregation and of reliance on racial stereotypes. As is clear from all the evidence, the General Assembly gave no consideration to such alternatives.[10] Likewise, the majority in the district court ignored the possibility of creating two majority-black districts which were more in accord with "traditional districting principles" than those in the North Carolina plan. By so doing, the majority abdicated its responsibility to assure that the remedy adopted by the General Assembly had been "narrowly tailored". See *Vera v. Richards, supra* at 1343-44, n.55.

CONCLUSION

The appellees' motions should be denied. The questions they seek to raise are insubstantial. However, the questions presented by appellants merit the Court's careful consideration with full briefing and argument.

Respectfully submitted,

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10 The announced criteria for redistricting adopted by the General Assembly never included "compactness" or "community of interest"; and the criterion of "contiguousness" was applied in a unique way. In sum, for the General Assembly it was "anything goes" in drafting the second redistricting plan, so long as it met the "quota" of two black Representatives from North Carolina.